SUPREME COURT, U. S.

No. 1046

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the United States District Court for the District of Columbia dismissing a complaint to set aside an order of the Interstate Commerce Commission. Appellant submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is reported at 260 F. Supp. 386 (adv. sheets), and a copy is attached hereto as Appendix A. A copy of the report on further considera-

tion, and order of the Interstate Commerce Commission, division 1, in *New York Central Transport Company Extension—Oakbrook, Ill.*, 99 M.C.C. 94, is attached as Appendix B. A copy of division 1's earlier report on reconsideration, and order, 92 M.C.C. 173, is attached as Appendix C. The report of the Commission's Operating Rights Review Board, dated August 10, 1962, 91 M.C.C. 161, and the report and recommended order of the Commission's Hearing Examiner, served March 16, 1962, are attached as Appendices D and E, respectively.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered on October 19, 1966, and notice of appeal was filed December 15, 1966. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the decision below on direct appeal; *United States* v. *Drum*, 368 U.S. 370; *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56; *Western Pacific Railroad Co.* v. *United States*, 382 U.S. 237.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of "special circumstances" such as those disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141, may authorize a railroad subsidiary to conduct motor-carrier operations not restricted to service auxiliary and supplemental to that of its rail parent?

2. Whether, in view of the provisions of the National Transportation Policy requiring "fair and impartial regulation of all modes of transportation" and the preservation of "the inherent advantages of each," the Commission, while requiring independent motor carriers to prove public convenience and necessity for their proposed service, may allow a railroad subsidiary to provide motor service to the same shipper without conforming to the same statutory standards?

3. Whether the Commission's report and order, and the decision of the district court upholding them, ignore this Court's decision in *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1, and are contrary to Congressional policy against rail entry into the motor-carrier field, and a long line of Commission and court decisions interpreting and applying that policy?

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901, and 1001, and Sections 1(18), 5(2)(a) and (b), 202(c)(2), 206(a)(1) and 207(a) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18), 5(2)(a) and (b), 302(c)(2), 306(a)(1), and 307(a), are set forth in Appendix F hereto.

STATEMENT

Eastman Kodak Company for many years maintained its Midwestern headquarters in Chicago. Recently, Eastman built a new plant at Oakbrook, Ill., a point 2½ miles outside the Chicago commercial zone. Twenty-eight independent motor carriers and two railroad motor-carrier subsidiaries[1] filed applications to provide truck service to the new Oakbrook plant. Nearly all the independent motor carriers and the two rail affiliates had served Eastman at its Chicago plant. The applications were consolidated and heard by a Commission hearing examiner. The applications of Transport Company and Motor Transit were protested by appellant and Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Cor-

[1] New York Central Transport Company (hereinafter Transport Company), a wholly-owned subsidiary of the New York Central Railroad, and Rock Island Motor Transit Co. (hereinafter Motor Transit), a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad.

poration, the latter two protests being subsequently withdrawn.

By report and order served September 8, 1961 (Docket No. MC-82, Sub-No. 11, *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*, not printed), the hearing examiner recommended that appropriate authority be issued to the twenty-eight independent motor carriers [2] to serve the new Eastman plant. He indicated that separate consideration would be given to the applications filed by the rail affiliates. On March 16, 1962, the examiner issued his report and order in Docket No. MC-67916 (Sub-No. 20), *New York Central Transport Company Extension—Oakbrook, Ill.*, which also embraced the application of Motor Transit, Docket No. MC-29130 (Sub-No. 92). He recommended that both applications be denied. Specifically, he found Oakbrook to be a non-rail point and that the rail-affiliates had failed to show that "special circumstances" warranted a grant of authority to serve it. (App. E, pp. 71-72).

The rail subsidiaries and Eastman filed exceptions to the examiner's report (Eastman only to the denial of Transport Company's application) and appellant replied. On August 15, 1962, the Commission's Operating Rights Review Board issued its report and order, upholding the hearing examiner's recommendations, 91 M.C.C. 161 (App. D). The board agreed with the hearing examiner that Oakbrook is a non-rail point and that applicants had not established that "special circumstances" warranted a grant of authority to serve it. 91 M.C.C., at 163-164 (App. D, pp. 60-61).

Motor Transit and Transport Company filed petitions for reconsideration of the Review Board's report and order, and appellant again replied. The Commission's Divi-

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[2] Twenty-seven such carriers were ultimately certificated, almost 19 months before Motor Transit's certificate was issued.

sion 1, in its report served June 28, 1963, reversed the examiner and the Review Board and granted the authority. The division agreed that both the rail-affiliated applicants were required to prove "special circumstances" to justify a grant of authority to serve Oakbrook; but went on to hold that Eastman's desire for their service (in addition to the service of the 27 independent motor carriers already authorized to serve Oakbrook) was sufficient to meet that burden. 92 M.C.C. 176-178 (App. C, pp. 51-54).

Appellant then unsuccessfully petitioned for reconsideration by division 1 of its report and order, and for a finding by the entire Commission of "general transportation importance." Having exhausted its administrative remedies before the Commission, appellant filed complaint in the District Court on April 8, 1964, seeking permanently to enjoin and set aside the Commission's report and order. The United States was named as a party defendant pursuant to Section 2322 of the Judicial Code, 28 U.S.C. § 2322. Motor Transit and Transport Company intervened as defendants in support of the Commission, and filed separate answers to the complaint.

On the same day complaint was filed, the Commission issued a certificate of public convenience and necessity to Motor Transit, authorizing it to transport general commodities, with certain exceptions, serving the plant site of Eastman at Oakbrook, as an off-route point in connection with its authorized regular route operations between Chicago and Silvis, Illinois.

By order served June 25, 1964, the Commission, on its own motion, reopened the proceedings for reconsideration. The district court entered an order on June 26, 1964, postponing all further proceedings. The Commission held no additional hearings, but reconsidered the matter on the basis of the record already made. In its report on further consideration (App. B), Division 1 granted Motor Transit's application, finding "special cir-

cumstances"[3] to be present, because no motor carrier holding competitive authority opposed the application and there was no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, 99 M.C.C. 99-100 (App. B, pp. 37-38). Finding that Transport Company's operations were, in substance, an integral part of its parent railroad's "piggyback" service, the division held that Transport Company could serve Oakbrook without motor carrier authority.

Appellant again unsuccessfully petitioned for reconsideration by division 1 of its report and order on further consideration, and for a finding by the entire Commission of "general transportation importance," once more exhausting its administrative remedies.[4]

On December 13, 1965, appellant filed a supplement to the original complaint, requesting that the division's final report be set aside. The Commission answered our original complaint and supplement thereto. Intervening defendants filed separate answers to the supplement to the complaint. The United States filed a separate answer to the complaint and supplement, saying it "neither admits nor denies the allegations thereof" and "neither supports nor opposes the order of the Commission."

The district court dismissed the complaint, holding that the Commission correctly concluded that "special circumstances" justified the grant of Motor Transit's application. It also affirmed the Commission's holding that Transport Company needed no motor-carrier authority to serve

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[3] Commissioner Murphy dissented, challenging the propriety of the majority's finding that Motor Transit had established the existence of "special circumstances." 99 M.C.C., at 103 (App. B, pp. 42-43)

[4] Thus, despite the important Congressional policy involved, the entire Commission treated this case as a purely routine matter, twice refusing the opportunity for a full-dress review of its division's action.

Oakbrook, since Oakbrook, "though not a rail point," is "described in a New York Central tariff, [and] is within that railroad's homogeneous terminal area at Chicago." 260 F. Supp., at 390 (App. A, p. 29).

THE QUESTIONS ARE SUBSTANTIAL

This case involves an administrative agency's refusal to adhere to its own well settled interpretation of Congressional policy, one which has only recently received this Court's approval.

In 1954, the Commission, as it had in numerous prior cases, referred to its long-followed policy of limiting trucking operations of railroads or their affiliates to "auxiliary and supplemental" service. Although it departed from the policy in that proceeding, it solemnly announced: [5]

> This policy was and is sound and should be relaxed only where the circumstances clearly establish (1) that the grant of authority has not resulted and probably will not result in the undue restraint of competition, and (2) that the public interest requires the proposed operation, *which the authorized independent motor carriers have not furnished, except where it suited their convenience.* (Emphasis supplied)

The Commission's decision was upheld by a three-judge district court (*American Trucking Assn's., Inc.* v. *United States*, 144 F. Supp. 365 (1956)), and the district court's decision was affirmed by this Court, 355 U.S. 141 (1957). But both courts made it plain that the sole basis for upholding the grant of unrestricted motor rights to the rail subsidiary there involved was "exceptional circumstances," i.e., the failure of the independent motor carriers in the area to render adequate service. In fact, this Court took

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[5] *Rock Island Motor Transit Co. Common Carrier Application*, 63 M.C.C. 91, 102 (1954).

pains to emphasize that "[s]hould the Commission prove to be less stringent in the future, appellants not only have recourse to the Congress, but also to the courts for review of the Commission's finding that 'special circumstances' exist." *Id.*, at 152.

And when the Commission, shortly after this Court's approval of its grant of unrestricted rights to the rail affiliate in the cited case, sought to deviate from the "special circumstances" doctrine it there adopted, this Court was quick to call a halt. In that case, *Pacific Motor Trucking Co.—Extension—Oregon*, 77 M.C.C. 605 (1958), another railroad's motor subsidiary was awarded unrestricted trucking rights, despite its failure to demonstrate any unwillingless or inability on the part of independent motor carriers to provide the service sought. Although the Commission's decision was upheld by the United States District Court for the District of Columbia (*American Trucking Assn's., Inc.* v. *United States*, 170 F. Supp. 38 (1959)), this Court reversed, 364 U.S. 1 (1960).* In its opinion, the Court explicitly recognized the "strong general [Congressional] policy against railroad invasion of the motor carrier field." *Id.*, at 6. It discussed the Congressional attitude reflected by a proviso to § 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(b), and noted that "it is evident that the policy of opposition to railroad incursions into the field of motor carrier service has become firmly entrenched as a part of our transportation law." *Id.*, at 7. In its opinion, the Court twice disclosed what we deem to be its understanding of the limits of the Commission's discretion in cases of this kind: first, when it recalled its earlier *Rock Island* decision "where the trucking service was not being performed adequately by independent motor concerns" (*Id.*, at 11), and second, when noting the "insufficient justifica-

* In view of the similar style of the two cases we will, for convenience, refer to the first mentioned as "*Rock Island*" and the second as "*Pacific Motor*."

tion" for the Commission's action, it stated: "There is, for example, no finding that independent contract carriers [7] were unable or unwilling to perform the same type of service as Pacific Motor." *Id.*, at 14-15.

Viewed in the light of the two important and recent Commission and court decisions referred to,[8] the agency decision, and its affirmance by the court below, cry out for review and reversal by this Court.

1. The grant of authority to Motor Transit does violence to this Court's decision in *Pacific Motor*, *supra*. Here, as there, the agency's decision contains no finding that independent motor carriers were unable or unwilling to provide the service which the rail subsidiary sought to perform. Small wonder, for nowhere in the testimony introduced by the supporting shipper, Eastman, or the rail subsidiary, was such a claim even made. Yet, the agency subverted the important Congressional policy involved, and circumvented the *Pacific Motor* decision, first, by ignoring it and, second, by improperly imposing the burden of proof upon the independent motor carriers, rather than the rail subsidiary, where it belongs.

In its first report, 92 M.C.C. 173, 178 (App. C, pp. 53-54), the division held that "the demonstrated specific need of the shipper, Eastman, constitutes 'special circumstances' in these proceedings." In the second report, 99 M.C.C. 94, 100 (App. B, p. 38), this statement is incorporated by the division's statement affirming "the findings

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[7] The Court had previously noted "that for purposes of the relevance of the § 5(2)(b) standards," there is no difference between rail applications to perform motor common or contract service. *Id.*, at 7.

[8] A spate of additional cases could be cited, all leading to the same result, but we submit that this Court's decisions in *Rock Island* and *Pacific Motor* so clearly delineate the course of action the Commission should have followed here that additional citation would be superflous.

in the prior report that Motor Transit should be granted the authority sought . . ." In *Pacific Motor*, this Court made it quite clear that the desire of a shipper for the services of a railroad subsidiary could not overcome the legal barrier thereto: "If that desire of General Motors, in combination with the policy of the Act, disables a railroad subsidiary from obtaining the business, that is simply the result of the National Transportation Policy (footnote omitted)." 364 U.S. 15 In the absence of any finding of inadequacy in the service of the independent carriers here, there is no more reason to bow to Eastman Kodak's desire than to General Motors in the cited case. If anything, there is much less. Here, Motor Transit is simply one of many motor carriers which have provided truck service to Eastman at its old plant. In *Pacific Motor*, the operations and plants of General Motors and the rail subsidiary were so correlated and interwined (in connection with rail and intrastate motor service) as to result in at least some real business hardship from denial of the interstate motor authority. The shipper there, General Motors, supported this assumption by actively participating throughout the proceedings before the Commission, the district court, and this Court. Here, Eastman didn't even except to the Examiner's report denying the authority sought by Motor Transit, the first of the four separate administrative steps before the Commission.[9] Thus, entirely aside from the Congressional policy here involved, the division's solicitude in proclaiming Eastman's need for the rail subsidiary's service "in order to utilize effectively and economically its new Oakbrook facility." 99 M.C.C., at 100 (App. B, p. 38) has a hollow ring, indeed. To paraphrase an old saw, we submit that Eastman's inaction speaks a lot louder than the Commission's words.

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[9] Eastman did except to the Examiner's denial of authority to the other rail affiliate, Motor Transport, but it did not participate at any further stage of the proceedings before the Commission.

2. In the first report, the division referred to Motor Transit's claim that it did not need to show "special circumstances" to obtain the authority sought, in view of the fact that it had already made such a showing in prior proceedings involving the same general area. The division found this contention "untenable," stating correctly, we believe, that: "The application of any motor carrier, whether a rail affiliate or not, must rest upon its own factual situation," citing the entire Commission's earlier *Rock Island* decision. 92 M.C.C., at 177 (App. C, p. 52). Yet in its second report, the division, in finding "special circumstances" emphasized that its conclusion was "further motivated" because "the instant application is but a slight extension" of the rail subsidiary's existing authority which is "free of the usual restrictions imposed on motor carrier operating rights issued rail affiliates." 99 M.C.C. 100 (App. B, p. 38). There is no word of explanation in the later report to indicate wherein the directly opposite conclusions of the earlier report, and the cited opinion of the entire Commission in *Rock Island*, are in error.

3. The division—in addition to giving improper weight to the shipper's desire for the services of the rail subsidiary—a desire which, as already noted, was not exactly overwhelming, also erroneously transferred the burden of proof from the rail subsidiary to the independent motor carriers and this appellant. It stated:

> In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. (Citing cases) And we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service. 99 M.C.C. 99 (App. B, pp. 37-38)

The Commission is the guardian of the Congressional policy against rail intrusion into the motor carrier field. As such, one would expect it to be ever alert to repel such intrusion, except under truly "exceptional circumstances" such as those referred to in this Court's opinions cited. Indeed, it should demand no less than a clear and compelling showing by the rail-affiliated applicant and/or its supporting shipper of the utter necessity for breaching the Congressional policy. Here, its action was so derelict as to amount to a complete abdication of its responsibility. At least as long ago as the *White Line* case,[10] the entire Commission made clear where the burden of proof lies in a case such as this:

> In other words, a railroad applicant for authority to operate as a common carrier by motor vehicle, though required to do no more than prove, as any other applicant, that its service is required by public convenience and necessity, has a special burden, not by reason of any attitude or action on our part, but by reason of the very circumstance that it is a railroad. *Where it fails to show* special circumstances negativing any disadvantage to the public from this fact, a grant of authority to supply motor service other than service auxiliary to and supplemental of train service is not justified. (Emphasis supplied)

Thus the burden was clearly on the rail affiliate here to show any inadequacies in the services of the independent motor carriers. This, as noted, it did not even attempt to do. This should have ended the matter, as the hearing examiner and review board correctly held. Indeed, this showing of inadequacy in existing service in order to justify a grant of new authority is not a *sine qua non* reserved for rail-affiliated applicants only. The same burden is normally imposed on independent motor carriers seeking to institute new operations. In *Hearin-Miller Trans-*

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[10] *Rock Island Motor Transit Co.—Purchase—White Line*, 40 M.C.C. 457, 474 (1946).

porters Ext.—Point Comfort, Tex., 100 M.C.C. 50, 55 (1965), the Commission's division 1 said:

> Applicants have the burden of establishing affirmatively, by substantial and competent evidence, that the present or future public convenience and necessity require their respective proposed operations. *The lack of opposition on the part of existing motor carriers, standing alone, does not create a presumption of need for a proposed new service.* (Emphasis supplied)

It is thus clear that division 1 was, almost contemporaneously, telling the independent motor carrier applicant in the *Hearin-Miller* case [10a] that the mere absence of opposition to its application created no presumption of a need for its proposed service, and telling the rail-affiliated applicant here, which is supposed to have a "special burden" in such cases, that it will infer a need for its services in the absence of protest. Thus, the division's action converts the rail affiliate's special burden into special privilege, contrary to the provisions of the governing statute.

4. If anything, the division's treatment of Transport Company's application does greater violence to Congressional policy than its generosity to Motor Transit. Whereas, in Motor Transit's case, the division required at least *some* showing, albeit too little to justify the authority granted,[11] the New York Central subsidiary was allowed to avoid any evidentiary burden whatever.

[10a] The cited case was decided four months after the case here involved.

[11] In the district court, we contended that Motor Transit failed to meet even the burden of proof imposed on independent motor carriers in application cases. The district court, characterizing this argument as invalid, held that we were, "in effect, arguing that the 27 ordinary motor carriers were improvidently certificated, . . ." and that in making the argument "ATA seems to have been motivated by the fact that Motor Transit is a railroad affiliate." 260 F. Supp. at 389 (fn. 8) (App. A, pp. 27-28). With deference, we would point out that whether the independent motor carriers were

In its first report, the division correctly held untenable Transport Company's contention that it was not required to show "special circumstances" because Oakbrook is within the "Chicago terminal zone" of its railroad parent (92 M.C.C., at 177, App. C, p. 52):

> The fact remains that Motor Transport desires to serve the Oakbrook facility in its capacity as a motor carrier.. As Oakbrook is located beyond the Chicago commercial zone, specific authority is required to provide this service. See *Commercial Zones and Terminal Areas*, 54 M.C.C. 21. To adopt Motor Transport's view that Oakbrook is a rail point because it is in the New York Central's Chicago terminal zone would mean that the railroad could obviate the showing by its motor carrier affiliate of "special circumstances" with respect to additional points or of the need for the latter's service thereat by the simple expedient of publishing a tariff embracing such points.

In its second report, the division came full circle and allowed Transport Company to do precisely what it had previously forbidden—to "obviate the showing . . . of 'special circumstances' with respect to additional points or the need for [Transport Company's] service thereat by the simple expedient of publishing a tariff embracing such points." 99 M.C.C. 100-101 (App. B, pp. 39-40).

This metamorphosis in the division's thinking seems to have resulted from a switch in its opinion of Transport Company's service—from that of a motor carrier, in its first report, to that of, essentially, a railroad,[12] in the

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"improvidently" certificated is water over the dam. The rail-affiliated applicants had the same opportunity as this appellant to protest one or more of the applications before the Commission, but chose to forego the privilege. And we readily admit that our protest of the applications of Motor Transit and Transport Company were, indeed, motivated by the fact that they are rail affiliates.

[12] The division contented itself with holding that "the specific delivery services here proposed by Transport Company may [not] be regarded as wholly separate from its rail parent's line-haul TOFC [trailer-on-flat-car, or "piggyback"] service. 99 M.C.C. 101 (App. B, p. 39)

second report. In so altering its views, and thus allowing the rail subsidiary to avoid entirely any consideration of the Congressional policy otherwise applicable, the division overlooked important applicable statutory provisions.

The New York Central's tracks do not extend from Chicago to Oakbrook. And if Transport Company's rail parent wanted to so extend them, it most assuredly would have to comply with the provisions of Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), requiring a showing of public convenience and necessity. This being so, we submit that, entirely aside from the Congressional policy here involved, the division could not validly, at one and the same time, proclaim Motor Transport's service to be, in effect, a rail service, and yet allow the railroad involved to avoid the obligation of compliance with § 1(18).

5. The division attempted to buttress its erroneous conclusion that Transport Company needed no authority to serve Oakbrook by an equally erroneous assumption that —if its rail parent offered Plan II rather than Plan III TOFC service to Eastman, the rail subsidiary "could serve Oakbrook under the partial exemption provided by 202(c)(2) of the act as [New York] Central's agent without specific authority under part II of the act," citing *Palisano Common Carrier Application*, 30 M.C.C. 591, 593 (1941), as authority. This "iffy" proposition has no record basis. An Eastman witness clearly indicated that the service involved is Plan III TOFC, not Plan II.[13]

In the first place, we do not agree with the Commission that if New York Central offered a Plan II service from Rochester to Chicago, it could lawfully serve Oakbrook as a point within the railroad's Chicago terminal area. Even assuming, *arguendo*, that Oakbrook is properly within the

[13] Francis P. Ryan, Assistant General Traffic Manager—Service, Eastman Kodak Co., Exh. 2, pp. 3-4, of the record before the Commission.

Chicago terminal area of the New York Central and that it offered the described Plan II service, we submit the Commission's conclusion that Transport Company would need no authority to serve Oakbrook would still be in error.

The basis for the Commission's finding that Transport Company needs no authority to serve Oakbrook is its conclusion that there is no material difference between the railroad's Plan II and Plan III service so far as Transport Company is concerned. 99 M.C.C. 100-101 (App. B, pp. 39-40). This conclusion is not only erroneous on its face; it is contrary to Commission decisions. There is a substantial difference between the two services. Under Plan II, the railroad provides its own door-to-door service, moving its own trailers on flatcars under tariffs usually similar to those of motor carriers. The motor carrier segment of the operation moves the traffic at rail rates and this motor carriage is completely under the control of the railroad. In contrast, under Plan III service, the shipper provides its own trailer, and it is responsible for delivery of the loaded trailer to the rail loading ramp and for its movement from the unloading ramp to ultimate destination. All the railroad does is load the trailer onto the flatcar at origin, perform the line-haul service, and unload the trailer from the flatcar at the rail terminal. So far as the rail carrier is concerned, Plan III eliminates pick-up and delivery expenses, acquisition, and maintenance charges for trailers, and empty return mileage. The railroad pays no rental charge for the trailers and no protective service is provided under Plan III rates. *Substituted Service—Charges and Practices of For-Hire Carriers and Freight Forwarders*, 322 I.C.C. 301, 311-312 (1964).

Moreover, a recent decision of Division 2, *All Freight In Trailer On Flat Car—Between The East And Chicago & East St. Louis*, 325 I.C.C. 591, 602 (1965), pointed out in detail the "inherent differences" between the Plan II and Plan III services of the rail respondents there in-

volved, including the New York Central, and stated that the "recognition of such inherent differences is implicit in the cited Commission decisions upholding the legality of plan III service." See also: *Movement of Highway Trailers by Rail*, 293 I.C.C. 93 (1954). Not to be overlooked either is that Transport Company sought authority from the Commission to serve Oakbrook in its own right; not as the motor carrier segment of a nonexistent Plan II service of its railroad parent.

In the second place, the *Palisano* case in no way supports the division's assumption. That case—insofar as it has any application here—merely held that the involved motor-carrier operations within the Buffalo area were subject to the exemption of Section 202(c)(2) of the Interstate Commerce Act, 49 U.S.C. § 302(c), when such operations were performed under contract with a railroad to provide pick-up and delivery service for it. It did *not* hold, as is inherent in the division's decision here, that independent motor carriers are to be restricted in providing service within the "terminal area" of any given community, to strict limits specified by the Commission, while railroads are free to expand their "terminal area" operations at will to serve new points such as Oakbrook, and thus gain the considerable advantage inherent in the freedom which the Commission allows them, but denies to their motor carrier competitors. Indeed, this is the most flagrant aspect of the division's favored treatment of Transport Company: its willingness to ignore the specific command of the National Transportation Policy for "fair and impartial regulation of all modes of transportation" and its requirement that "[a]ll of the provisions of this Act shall be administered and enforced with a view to carrying out" the policy. If a railroad, through what amounts to a process of self-government, can enlarge its (or its subsidiary's) area of service 2½ miles beyond the point where independent motor carriers have to stop, why may it not increase its competitive edge in other instances

to five, ten, perhaps fifty miles? According to the Commission and the court below, this is not a real problem; motor carriers, they say, may appeal to the Commission, urging it to hold that the railroad has enlarged its operating authority—to use the district court's language—beyond its "homogeneous" terminal area at the point involved. Perhaps we are ungrateful, but the suggested solution to the grossly unequal treatment of railroads and motor carriers perpetrated here by the division, and approved by the district court, affords us no comfort whatever.

6. As noted, the *Palisano* case offers no support for the discrimination against independent motor carriers inherent in the decision of division 1. Neither do the provisions of § 202(c)[14] of the Interstate Commerce Act. The section merely provides that motor vehicle operations within "terminal areas" shall be exempt from economic regulation by the Commission under Part II of the Interstate Commerce Act, but shall be regulated under the other sections of the Act applicable to the mode of transport, or forwarder, which conducts such motor vehicle operations, or has them performed by an agent. Section 202(c) in no way suggests that railroads should be allowed to determine the extent of their own exemption, while motor carriers should be held strictly to limits prescribed for them by the Commission. In *Commercial Zones And Terminal Areas*, 54 M.C.C. 21 (1952), the Commission, division 5, established general rules prescribing terminal area limits for motor carriers and freight forwarders. In the course of a lengthy opinion, it said:

> The proposal to abandon the contemplated provision of a general rule and leave the definition of their terminal area limits to the initiative of each motor car-

[14] The provisions of subsections (1) and (2) of § 202(c) differ only in that the first applies to motor vehicle operations within terminal areas performed directly by the various modes of transport mentioned, and by freight forwarders, whereas the second applies to such operations when performed on an agency basis for the carriers specified, or forwarders.

> rier or freight forwarder, even if their proposals were subject to suspension and investigation, would not work. Failure to adopt such a rule would almost surely be the signal for such a host of differing individual proposals as to overwhelm our capacity to investigate and would result in intolerable confusion to the disadvantage of both the public and the industry. We are convinced that it is wholly impracticable to leave the definition of terminal area limits to motor-carrier or forwarder initiative. *Id.* at 56-57.

But the same agency is perfectly willing to leave the definition of *railroad* terminal area limits to the initiative of the railroads, subject, as the district court noted, "to investigation and suspension by the Commission." 260 F. Supp. 390 (App. A, p. 30).

In its first report in *Commercial Zones And Terminal Areas*, 46 M.C.C. 665 (1946) the Commission recognized the futility of attempting to specifically describe motor carrier terminal areas for each city and town in the United States, an approach which it had theretofore taken. It acknowledged the "advantages inherent in this piecemeal approach" but rejected it because of the "innumerable proceedings for the determination of the terminal areas of each [motor] carrier at each point served by it. Obviously, such a course would be prohibitively burdensome and wholly impracticable." *Id.*, 670-671. Why the retention of the "piecemeal approach" for railroads is any less burdensome and impracticable, we are at a loss to understand. Generally speaking, the railroads serve the same points throughout the United States as do the motor carriers.

The facts of this case demonstrate very clearly the favoritism displayed by the division to the railroad subsidiary here. All the independent motor carriers seeking to serve Eastman's Oakbrook plant were obligated to seek authority from the Commission, with the attendant ex-

pense and "red tape" involved.[15] But the rail subsidiary, seeking to serve the same shipper at the same location is spared any evidentiary obligation at all, merely because its parent corporation has listed Oakbrook as a point in its Chicago area terminal tariff.[16] Even if rail subsidiaries seeking to enter the motor field stood on the same footing as independent motor carriers—even if they bore no "special burden," when seeking to enter the motor field—the agency action here would still constitute a flagrant violation of the Congressional requirement of fair and impartial regulation of all transport modes set forth in the National Transportation Policy.

The acceptance by the division and the court below of the tariff filed by Transport Company's rail parent as a legal *fait accompli* has no basis in reason or law. In *Chicago, M., St. P & P. R.* v. *Alouette Peat Products*, 253 F. 2d 449, 456 (CCA 9, 1958), the court said:

> A rate which is in fact unreasonable is not made reasonable by the mere act of filing, nor does the mere act of filing make lawful a publication not made in accordance with the provisions of the act. Filing

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[15] To be sure, Transport Company assumed it would require authority and thus followed the same course as the independent motor carriers. But, in view of the windfall it received, it need not have done so.

[16] Even had we sought the "relief" which the Commission and the court below hold out, by attempting to institute a proceeding before the agency to challenge the railroad's publication of Oakbrook as a point within its Chicago "terminal area," what basis is there to believe the agency would have been any less favorably disposed toward the railroad than it has been here? Our petition could have been denied summarily, or, after a long drawn-out hearing, the agency could well have denied the relief sought on the ground that, as noted by the court below, "Oakbrook is only two and one-half miles beyond the Chicago commercial zone." 260 F. Supp. 390 (App. A, p. 29). The Commission recently denied summarily a petition by appellant in Ex Parte No. 242, *Express Co. Terminal Areas*, seeking to have railroad terminal areas prescribed in such a manner as to remove the discrimination which now exists.

does not constitute publication, or cure a defective publication.

A fortiori, the "simple expedient" whereby Transport Company's rail parent included Oakbrook as being within its so-called Chicago terminal area should not have received the blessing of the agency and court below, where "the mere act of filing" does violence to Congressional policy and the governing decisions of this Court.

It will, no doubt, be urged by appellees that the Commission has prescribed motor-carrier terminal area limits for many years, while, at the same time allowing railroads to exercise their initiative in prescribing their own terminal area limits. But discrimination long practiced is no less discrimination, or, as this Court has put it, "even consistent error is still error." *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, 678, fn.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, this Court should note probable jurisdiction, reverse the decision of the court below, and remand the case to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Peter T. Beardsley, one of the attorneys for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 9th day of February, 1967, I served copies of the foregoing document on the several parties herein, as follows:

1. On the United States, by mailing copies in duly addressed envelopes, with postage prepaid, to Honorable Thurgood Marshall, Solicitor General, Honorable Donald F. Turner, Assistant Attorney General, Howard E. Shapiro, Esq., and Jerry Z. Pruzansky, Esq., Department of Justice, Washington, D. C. 20530; and David G. Bress, United States Attorney for the District of Columbia, Washington, D. C.;

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes, with postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Leonard S. Goodman, Esq., Assistant General Counsel, at the offices of the Commission, Washington, D. C. 20423;

3. On New York Central Transport Co., intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Herbert Burstein, Esq., 160 Broadway, New York, N. Y., and Joseph Rotwein, Esq., 1500 Massachusetts Ave., N. W., Washington, D. C.;

4. On Rock Island Motor Transit Company, intervening defendant, by mailing copies in duly addressed envelopes, with postage prepaid, to its counsel, Martin L. Cassell, Esq., and Thomas J. Megan, Esq., 139 W. Van Buren Street, Chicago, Illinois; and Walter J. Myskowski, Esq., 712 Ring Building, 1200 18th Street, N. W., Washington, D. C.

PETER T. BEARDSLEY

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 835-64

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,

ROCK ISLAND MOTOR TRANSIT COMPANY,
NEW YORK CENTRAL TRANSPORT COMPANY,
Intervenors,

* * * *

Before WILBUR K. MILLER, Senior Circuit Judge, KEECH, District Judge, and MATTHEWS, District Judge.

WILBUR K. MILLER, Senior Circuit Judge: Several years ago Eastman Kodak Company decided to move its midwestern sales and distribution facilities from Chicago to a new plant it planned to erect at Oakbrook, Illinois, about two and one-half miles west of the Chicago commercial zone. Desiring to retain the services of the trucking companies which had served its Chicago facilities, Eastman requested the 30 companies involved to apply to the Interstate Commerce Commission for authority to serve the Oakbrook installation. All did so—28 independent trucking companies and two companies wholly owned by railroads.[1] No applicant opposed the applica-

[1] Rock Island Motor Transit, a subsidiary of the Chicago, Rock Island & Pacific Railroad Company, and New York Central Transport, a subsidiary of the New York Central Railroad Company.

tion of any other, but the plaintiff, American Trucking Associations, Inc., opposed the applications of the railroad affiliates, and was the only real protestant. At a consolidated hearing before a trial examiner in 1961, Eastman produced witnesses who testified in support of all 30 applicants. The plaintiff presented no evidence.

Twenty-seven of the 28 independent applicants were certificated by the Commission. On June 25, 1965, after prolonged proceedings upon which we think it unnecessary to elaborate, a division of the Interstate Commerce Commission issued a certificate of convenience and necessity authorizing Motor Transit to serve the Oakbrook installation, and held that Transport already had the authority it sought, by virtue of the fact that Oakbrook, though not a rail point, is described in a New York Central tariff as being within the Chicago terminal area of that railroad.

Thereupon the American Trucking Associations, Inc., by amending its complaint theretofore filed, asked the Court to annul, set aside and permanently suspend and enjoin the reports and orders of the Interstate Commerce Commission which certificated Motor Transit and held Transport already had the authority it sought.[2] The two railroad-owned motor carriers were permitted to intervene.

At the outset it should be noted that judicial review of these orders is extremely limited. The Supreme Court has said that

> ". . . the [Federal Power] Commission's order does not become suspect by reason of the fact that

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[2] That the plaintiff lacked standing to bring this suit was persuasively argued by the Commission. If the question were open, we should be inclined to hold that ATA lacked standing; but the Supreme Court has ruled otherwise. *American Trucking Assns. v. United States*, 355 U.S. 141, 144 (1957).

> it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. . . .[3]

This excerpt from the *Hope* opinion was repeated in *Interstate Commerce Comm'n* v. *City of Jersey City*, 322 U.S. 503, 512-13 (1944). The *Jersey City* opinion also quoted the following from the *Rochester Telephone* case:[4]

> ". . . So long as there is warrant in the record for the judgment of the expert body, it must stand . . . 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.' . . ."

Accordingly, our function is to ascertain whether the Commission has correctly applied the law and, if so, whether its findings sufficiently indicate the bases for the conclusions reached, and whether the evidence contains substantial support for the findings. Those are the limits of our power of review.

Rock Island Motor Transit Company. Prior to this proceeding, Motor Transit was operating an unrestricted service authorized by the Commission from Chicago to many points in the Midwest and was moving Eastman's shipments from the latter's Chicago facility to the numerous places to which it made deliveries. It sought authority to serve the new Oakbrook plant as an off-route point in connection with its regular-route operations to and from Chicago, already authorized.

The basic statutory authority of the Interstate Commerce Commission to grant certificates of public conven-

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[3] Federal Power Comm'n v. Hope Natural Gas Co., 320 U. S. 591, 602 (1944).

[4] Rochester Telephone Corp. v. United States, 307 U. S. 125, 145-46 (1939).

ience and necessity to motor carriers is found in § 207 (a)[5] of the Interstate Commerce Act, 49 U.S.C. § 307 (a), 49 Stat. 551. Section 5(2) (b)[6] of the Act, 49 U.S.C. § 5(2) (b), 54 Stat. 906, having to do with acquisitions and mergers, imposes restrictions on the grant of authority to a motor carrier which is controlled by or affiliated with a railroad. The Commission has interpreted this statute as confining acquisition of a motor carrier by a railroad or its affiliate to "operations . . . which are auxiliary or supplementary to train service."[7]

In *American Trucking Assns.* v. *United States*, 355 U.S. 141 (1957), the Supreme Court pointed out that § 207(a) does not contain the restrictive language of

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[5] "Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirement, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied . . . ."

[6] "Sec. 5(2)(b) ". . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

[7] American Trucking Assns. v. United States, 355 U. S. 141, 148 and footnote 8 on p. 148 (1957).

§ 5(2)(b) and that there is no language in § 207(a) "even suggesting a mandatory limitation to service which is auxiliary or supplementary." Later in the opinion the Court said, at pages 149-50:

> "In interpreting § 207, the Commission has accepted the policy of § 5(2)(b) as a guiding light, not as a rigid limitation. While it has applied auxiliary and supplementary restrictions in many § 207 proceedings, the Commission has occasionally issued certificates to railroad subsidiaries without the restrictions where 'special circumstances' prevail, namely, where unrestricted operations by the rail-owned carrier are found on specific facts and circumstances to be in the public interest. . . .
>
> "We conclude, therefore, that the Congress did not intend the rigid requirement of § 5(2)(b) to be considered as a limitation on certificates issued under § 207."

Thus the Commission had authority to grant Motor Transit's application to serve the Oakbrook plant regardless of § 5(2)(b) if it correctly found "special circumstances" negating any possible disadvantage to the public from the grant to a railroad-owned carrier. The plaintiff contends there were no "special circumstances" shown and that, therefore, the certification of Motor Transit was erroneous. Whether so or not is the question with respect to that company.[8]

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[8] The ATA, seriously and at considerable length, also argues that "Motor Transit failed even to meet the burden of proof required of ordinary motor carriers." We are not impressed by that contention because we note that the application of Motor Transit was consolidated with those of 28 ordinary motor carriers as well as with that of New York Central Transport, and that the 30 applications were heard together.

Evidence in support of the 30 applications was presented only by Eastman and was the same in all instances. Thus, the application of Motor Transit was supported by the same proof pursuant to which 27 ordinary motor carriers were certificated. Yet ATA did not attack the certificates of the latter as having been granted on

In discussing the special circumstances question, the Commission said:

> ". . . Motor Transit has been serving Eastman's Chicago plant and is merely seeking to continue to provide Eastman with the same service to the same points from the new facilities at Oakbrook. It is not seeking to provide a new service in the terms discussed in the *Pennsylvania* case [*Pennsylvania Truck Lines, Inc.* v. *United States*, 219 F. Supp. 871 (W.D. Pa. 1963)] nor will its proposed service inject a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit. In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. . . . And we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service.
>
> "Thus, the facts of the matter are that: (1) Eastman has indicated a need for a continuation of the service of Motor Transit from Oakbrook to the points Motor Transit has served from Chicago, (2) no motor carrier holding competitive authority opposes the application and there is no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, and (3) a denial of the

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insufficient proof. So, in arguing that "Motor Transit failed even to meet the burden of proof required of ordinary motor carriers," the ATA is, in effect, arguing that the 27 ordinary motor carriers were improvidently certificated, although it did not oppose them. In making the invalid argument under discussion, ATA seems to have been motivated by the fact that Motor Transit is a railroad affiliate.

> application would clearly deprive the shipper of a transportation service which it has enjoyed in the past and which it needs in order to utilize effectively and economically its new Oakbrook facility. . . ."

The Commission also pointed out that Motor Transit's existing authority is free of the usual restrictions imposed on motor carrier operating rights issued to rail affiliates and that "the instant application is but a slight extension" of the authority. We hold that the Commission correctly concluded that special circumstances exist which amply justified the grant of Motor Transit's application.

New York Central Transport Company. This motor carrier sought a certificate to serve Eastman's Oakbrook plant from Chicago, although that operation would be subsequent to a rail movement to Chicago from the shipper's Rochester facilities. The Commission held that such a certificate was unnecessary as New York Central Transport already had, under its rail parent's authority, the right to make deliveries from Chicago to Oakbrook because Oakbrook, though not a rail point, is properly described in a tariff of the New York Central Railroad as being within the railroad company's Chicago terminal area.

Distilled to its essence, ATA's position seems to be that Oakbrook is not properly described as being within New York Central's Chicago terminal area. We have noted that Oakbrook is only two and one-half miles beyond the Chicago commercial zone, and we think it apparent, therefore, that Oakbrook, being described in a New York Central tariff, is within that railroad's homogeneous terminal area at Chicago.

ATA argues that if a railroad can extend its terminal area two and one-half miles beyond the commercial zone of its terminal city by the simple expedient of publishing a tariff for that point, it could by the same expedient extend its terminal area somewhat indefinitely. The ar-

gument is invalid because any terminal area description is subject to investigation and suspension by the Commission and may be attacked by the complaint of any interested party. Long ago, in *Palisano Common Carrier Application*, 41 M.C.C. 229, 232 (1942), the Commission said:

> "Terminal areas must, of course, be limited to areas in which the motor-vehicle transportation consists of genuine transfer, collection, or delivery service as distinguished from line-haul transportation. Where the terminal areas of the rail carriers, motor carriers, express companies, water carriers, and freight forwarders extend beyond the corporate limits of a village, town, or city, such 'terminal areas' should be defined in their tariffs. Such descriptions of terminal areas are subject to suspension and investigation by this Commission and may be attacked upon complaint of any interested party."

There is no authoritative definition of a terminal area. It is necessary that any question concerning the propriety of any such area be determined upon the facts of the particular case presented.

We are clearly of the opinion that Oakbrook was properly held by the Commission to be within New York Central's Chicago terminal area. We hold therefore that the Commission was correct in concluding that Transport did not need a certificate for its operations between Chicago and Oakbrook.

Affirmed.

* * * *

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided June 25, 1965

* * * *

REPORT OF THE COMMISSION ON FURTHER CONSIDERATION

DIVISION 1, COMMISSIONERS MURPHY, BUSH, AND BROWN

BUSH, *Vice Chairman:*

In these two applications, the specifications of which are set forth in the appendix to this report, New York Central Transport Company (Transport Company) and The Rock Island Motor Transit Company (Motor Transit), wholly owned motor carrier subsidiaries of the New York Central Railroad Company (Central) and the Chicago, Rock Island and Pacific Railroad Company (Rock Island), respectively, seek certificates that would generally authorize them to serve the site of the Eastern [sic] Kodak Company, at Oakbrook, Ill., in the movement of general commodities.[2] These proceedings have been reopened in order to examine whether applicants, as motor carrier affiliates of railroads, require additional authority under part II of the Interstate Commerce Act to perform the operations they propose; and, if so, whether they have met their burden of proving that so-called special cir-

[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

[2] A certificate authorizing the operations sought, subject to certain restrictions, was issued to Motor Transit on April 8, 1964. No certificate has been issued to Transport Company.

cumstances exist which warrant the relaxation of the general policy against granting functionally unrestricted (neither auxiliary to nor supplementary of rail movements) motor carrier authority to railroad affiliates.

Both applications were opposed by American Trucking Associations, Inc., and Consolidated Freightways Corporation of Delaware (and an affiliate of the latter, New York Consolidated Freightways Corporation), hereinafter called ATA and Consolidated, respectively. Consolidated stated in a telegram addressed to the Commission, dated April 23, 1962, that its opposition to the granting of the authority sought by Transport Company would be withdrawn upon amendment of the latter's application so as to restrict service to the handling of traffic which has had a prior, or will have a subsequent, rail movement. Such an amendment has been made.

HISTORY OF THE PROCEEDINGS

The Operating Rights Review Board affirmed the examiner's recommended denial of the applications, 91 M.C.C. 161 (decided August 10, 1962). The board concluded, *inter alia, (a)* that both applicants required appropriate motor carrier authority to perform the proposed operations, but *(b)* that they had failed to demonstrate that "special circumstances" exist which would warrant a grant to them of functionally unrestricted authority. Upon consideration of the record, petitions by applicants, and a reply by ATA, former division 1 reopened the proceedings for reconsideration on the present record by order of February 13, 1963. In the prior report on reconsideration, 92 M.C.C. 173 (decided June 17, 1963), while affirming the board's conclusions that both applicants require motor carrier authority, "special circumstances" were found to exist and the applications were granted. ATA thereupon filed suit in the United States District Court for the District of Columbia (American Trucking Association, Inc. *v.* United States, civil action No. 835-

64), but upon consideration of the record, division 1, by order of June 23, 1964, reopened the proceedings for further consideration.

STATEMENT OF FACTS

Eastman, at the time of the hearing (1961), was in the process of building a plant at Oakbrook—a point about 2.5 miles outside of the Chicago commercial zone but within Central's rail terminal area.[3] Both applicants have served Eastman's Chicago plant (located in the Chicago commercial zone): Transport Company as a carrier of inbound freight on traffic originating at Eastman's Rochester plant and Motor Transit as a distribution carrier on outbound traffic moving from Eastman's Chicago plant to points in an area Motor Transit serves under certain functionally unrestricted motor carrier authority. They both desire to continue to serve Eastman at its new facilities at Oakbrook in the same manner that they have been serving it at Chicago. As a result of a hearing on a consolidated record with the instant application proceedings, (No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.* (not printed), decided October 9, 1961), 27 independent motor carriers were authorized to serve Eastman's Oakbrook plant. Interstate Motor Freight System and Schrieber Trucking Co., Inc., provide Eastman with an inbound service similar to that proposed by Transport Company from Rochester and 23 carriers provide Eastman with an outbound service similar to that proposed by Motor Transit.

Prior to 1946, Eastman had used rail boxcar service between Rochester and Chicago, but Interstate and Schrie-

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[3] The terminal area of a railroad at a point embraces all points in an area within which it performs bona fide collection, delivery, or transfer service. If the terminal area of a railroad embraces points beyond a municipality, it must be specifically described in appropriate tariffs of the railroad. Oakbrook is described as such a point in one of Central's tariffs (discussed *infra*).

ber have been serving it since 1946 and 1957, respectively. In 1959 Central established plan III, trailer-on-flatcar (TOFC),[4] rates and Eastman diverted substantial portions of its traffic moving from Rochester to Chicago from all-motor movement to the rail-motor plan III TOFC service. These shipments are handled as follows: (1) a Flexi-Van, which is the name given by Transport Company to the trailers it owns and uses in its integrated rail-motor services, is leased by Transport Company to Eastman at Rochester, (2) Transport Company provides a local pickup service for Eastman for the movement of the leased trailer to the rail ramp (both Eastman's Rochester plant and the rail ramp are within the Rochester commercial zone), (3) the Flexi-Van is then transported by Central by rail to the rail ramp in Chicago, and (4) Transport Company's Flexi-Van, which is still under lease to Eastman, is then transported by Transport Company for Eastman to Eastman's plant at Chicago (or, under the present proposal, Oakbrook). (Although Transport Company avers that it also participates in a plan II[5] TOFC service wherein Central would lease Transport Company's Flexi-Van equipment and hire Transport Company for the motor portion of the movement, the shipper indicates that only plan III service has been utilized.

DISCUSSION AND CONCLUSIONS

Whether applicants, as rail-carrier affiliates, should be granted authority to serve Eastman's Oakbrook plant depends initially upon whether any specific authority under

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[4] Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroads.

[5] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

part II of the act is needed by them to perform the proposed services, and secondly, upon whether "special circumstances" warrant the issuance to them of functionally unrestricted motor carrier operating authority. The first question arises because Oakbrook is a point within the rail terminal area of Central, as provided for by its plan II tariff; and because section 202(c)(2) of the Interstate Commerce Act exempts from the certificate and permit requirements of part II of the act, motor transportation conducted—

> by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental.

The second question results from the long-established policy, articulated expressly in section 5(2)(b) of the act and generally in the national transportation policy, against railroad incursions into the field of independent motor carrier service. *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1 (1960). Because of the differing and particular circumstances surrounding each of the present applications, these issues must be considered separately as they relate to each applicant.

MOTOR TRANSIT

The service proposed by Motor Transit, notwithstanding that it is an affiliate of a rail carrier (Rock Island) or that Oakbrook is within Central's terminal area, will not be performed as an incident of rail service. Motor Transit proposes to serve Oakbrook as an off-route point in connection with its presently authorized regular-route motor carrier service extending from Chicago to a large

number of described points in the Midwest, and all movements handled by it from or to Oakbrook would presumably have either a prior or subsequent line-haul movement by motor vehicle. A motor carrier, regardless of its affiliation with a carrier by railroad, is subject to the requirements of part II of the act (see *New York Central Transport Co.—Modification*, 89 M.C.C. 389). And inasmuch as the service to be performed by Motor Transit at Oakbrook is "incidental" to a line-haul motor movement, it follows that motor carrier authority is necessary if the point to be served is outside the motor carrier terminal area of that point. The sixth supplemental report in *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, in effect determines that a motor carrier's terminal area at a municipality is coextensive with the commercial zone of that municipality (49 CFR 170.45). Oakbrook is outside the commercial zone of Chicago (49 CFR 170.2) and is thus also beyond that area which Motor Transit can serve under the partial exemption of section 202(c)(2) of the act as an incident of its line-haul motor movement. We conclude that Motor Transit needs certificated authority under part II of the act to serve Oakbrook in the manner proposed.

The requirements of section 5(2)(b) of the act, as they are applied to rail affiliates seeking motor carrier authority under section 207 of the act, in effect, proscribe grants of functionally unrestricted authority to such carriers except in those instances where it may be determined that "special circumstances" prevail which negate any possible disadvantage to the public that may result from the grant to a rail-owned motor carrier of such unrestricted rights. In making this determination, each proceeding must be decided upon its own factual situation. Cf. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457; *Union Pac. Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279; and *Rock Island Motor Transit Co. Com. Car. Application*, 63

M.C.C. 91, affirmed, *American Trucking Assns., Inc.*, v. *United States*, 355 U.S. 141. Our analysis of the record in the subtitled proceeding convinces us that Motor Transit has established the existence of "special circumstances" warranting the grant to it of the independent motor carrier authority it seeks.

In *Pennsylvania Truck Lines, Inc., Extension—Cement*, 91 M.C.C. 167, affirmed *sub nom., Pennsylvania Truck Lines, Inc.*, v. *United States*, 219 F. Supp. 871 (W.D. Pa. 1963), numerous motor carriers vigorously opposed the rail carrier affiliates' proposals to provide a new motor carrier service not theretofore offered by them. The Commission found, on the facts in that proceeding, that the independent motor carriers opposing any grants of authority to the rail-affiliated applicants were authorized and willing to meet the reasonable transportation requirements of the eastern cement producers, and that the denial of certain applications of the railroad motor affiliates would not deprive the cement industry of a needed transportation service. Such is not the case here. Motor Transit has been serving Eastman's Chicago plant and is merely seeking to continue to provide Eastman with the same service to the same points from the new facilities at Oakbrook. It is not seeking to provide a new service in the terms discussed in the *Pennsylvania* case nor will its proposed service inject a new quantum of competition detrimental to those independent motor carriers which also have been serving Eastman's Chicago plant and which do not oppose the issuance of authority to Motor Transit. In this connection, it is of real significance in a proceeding such as this that the application is not opposed by competing motor carriers but only by ATA which presented no evidence as to the services which competitive motor carriers are ready, willing, and able to provide. Cf. *Burlington Truck Lines, Inc.—Purchase—Pirnie*, 85 M.C.C. 363, 372-373; and *Burlington Truck Lines, Inc., Extension—Lemont, Ill.*, 94 M.C.C. 195. And

we may not infer injury to competing carriers in the absence of evidence indicating that present transportation facilities can and are willing to meet the shipper's need for service.

Thus, the facts of the matter are that: (1) Eastman has indicated a need for a continuation of the service of Motor Transit from Oakbrook to the points Motor Transit has served from Chicago, (2) no motor carrier holding competitive authority opposes the application and there is no indication that any motor carrier is able or willing to serve those points which Motor Transit is authorized to serve and has been serving in the past, and (3) a denial of the application would clearly deprive the shipper of a transportation service which it has enjoyed in the past and which it needs in order to utilize effectively and economically its new Oakbrook facility. We recognize that certain independent motor carriers granted authority in the related proceeding in the *Best Way* case, *supra*, may well be able to serve some of the points Motor Transit can serve, and their existence is a factor to be considered in determining whether there are present, on this record, "special circumstances" supporting a grant of authority to Motor Transit. Their existence, however, without further evidence of their willingness and ability to serve Eastman in the manner proposed by Motor Transit clearly cannot be said to warrant a denial of this application. We, therefore, affirm the findings in the prior report that Motor Transit should be granted the authority sought by it in the subtitled proceeding. In arriving at this conclusion we are further motivated by a realization that in this geographical area applicant's existing authority, of which the instant application is but a slight extension and with which any authority granted in this proceeding will be combined or tacked to provide the service needed, is free of the usual restrictions imposed on motor carrier operating rights issued rail affiliates. Cf. *Rock Island Motor Transit Co. Ext.—U. S. Highway 69*, 88 M.C.C. 491.

TRANSPORT COMPANY

Transport Company, unlike Motor Transit, proposes to serve Eastman's Oakbrook plant from Chicago, subsequent to a rail movement to Chicago from that shipper's Rochester facilities; and it seeks a motor carrier certificate despite its admitted ability to perform the same physical operation "for" Central as an incident of Central's Rochester-Chicago rail service. Thus, if Central held itself out to Eastman to provide a complete service on the movement of traffic from Rochester to Oakbrook, as it assertedly offers under its plan II TOFC tariff, Transport Company could serve Oakbrook under the partial exemption provided by section 202(c)(2) of the act as Central's agent without specific authority under part II of the act. See *Palisamo Common Carrier Application*, 30 M.C.C. 591, 593 (1941). It is equally plain that Transport Company would require appropriate motor carrier authority in order to provide the Chicago-Oakbrook service in its own right unrelated to its parent's rail service and subject to its own motor carrier tariffs; for, no carrier may provide, or publish tariffs covering, an unauthorized for-hire motor service not otherwise exempt from the certificate and permit requirements of the act. But the questions remain as to whether the specific delivery services here proposed by Transport Company may, indeed, be regarded as wholly separate from its rail parent's line-haul TOFC service and whether, even if they could be so regarded, such services should be specifically authorized in the circumstances here present. We think that these questions, on the particular record before us, must be answered in the negative.

What is offered under plan II TOFC by Central is a door-to-door, motor-rail-motor, Flexi-Van service, and what is proposed here under plan III is the same integrated service, albeit under the guise that Transport Company would act independently of its rail parent, Central, in offering the shipper a different service than is

today held out by Central alone. This, however, is a difference in form, not in substance. The plan III TOFC service which Transport Company and Central together offer the shipping public is unique when compared with the TOFC services proffered by most other rail carriers: Flexi-Vans are not leased to other motor carriers by Transport Company and Central does not (because it is not so equipped) handle any trailers other than Flexi-Vans. Thus, Eastman has no choice other than to use Transport Company to transport a Flexi-Van to Central's ramp in Rochester and to again use Transport Company to transport the Flexi-Van from Central's ramp at Chicago to the plant in Oakbrook. The services provided by these affiliated carriers under plans II and III, in the peculiar circumstances presented, plainly are inseparable, although there would be only one rate under plan II and at least two individual rates under plan III.

We have often held that a carrier which can perform a transportation service under existing laws or regulations should not be issued additional authority. Compare *Sheridan-Indianapolis Bus Line, Inc., Ext.—Sheridan*, 91 M.C.C. 193, 92 M.C.C. 285. This is true whether the proposed operation can be conducted by virtue of specific operating authority held by the carrier or because the proposed operation is partially exempt from regulation by the Commission. Cf. *Werner Common Carrier Application*, 95 M.C.C. 387. And it is equally true that operating authority should not be issued to enable a carrier to make subject to direct economic regulation by this Commission a transportation service that otherwise would be exempt from such regulation. Accordingly, we do not believe, in the circumstances here before us, that sound regulatory policy would be served by a grant to Transport Company of unneeded motor carrier operating authority that would only enable it to perform a transportation service identical to that which it can presently perform in conjunction with its parent railroad, albeit under

a different form or style of rates. We conclude that the application of Transport Company in the title proceeding must be denied.

One further matter requires consideration. The ATA asserts that certain motor carriers do not oppose the present applications because of undisclosed pressures brought upon them by either applicants or their supporting shipper. The ATA itself does not support its allegations with any facts, and our review of the record indicates nothing which in any way lends credence to ATA's assertion. Eastman supported the applications of those carriers which had been serving it at its Chicago plant, and, except for Consolidated (which withdrew its opposition to Transport Company's application upon the offering by Transport Company of a restrictive amendment which protected Consolidated's interest), the remaining protestants withdrew their opposition upon either the amendment of the applications or Eastman's agreeing at the hearing to support their proposed applications to serve Oakbrook. Consolidated has not participated in the Motor Transit proceeding subsequent to the hearing and, so far as we can determine from the present record, holds no authority to provide service competitive with that offered by Motor Transit. We find, in these circumstances, no merit to the unsubstantiated arguments of ATA.

FINDINGS

In No. MC-67916 (Sub-No. 20), on further consideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

In No. MC-29130 (Sub-No. 92), on further consideration, we find that the present and future public convenience and necessity require operation by applicant, in

interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the plant site of the Eastman Kodak Company at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations between Chicago and Silvis, Ill., restricted against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties; and that applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder. Since the certificate has already been issued to Motor Transport, no further findings are required in this proceeding.

An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting in part:

I am unable to agree with the majority's finding that Motor Transit has established the existence of "special circumstances" warranting the grant to it of the unrestricted motor carrier authority it seeks. The test for determining "special circumstances" has been clearly defined by the courts and the Commission. In *Pennsylvania Truck Lines, Inc.*, v. *United States*, 219 F. Supp. 871 (W.D.Pa. 1963) the court stated: "The only 'special circumstances' which have led the Commission to relax its restrictions on motor service by rail subsidiaries have been the unavailability of independent motor carrier service for the area involved." See also *American Trucking Assns., Inc.*, v. *United States*, 364 U.S. 1 (1960) and cases discussed therein.

Although no representations were made by the 27 motor carriers recently granted authority [in No. MC-82 (Sub-

No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*] to serve Eastman's Oakbrook plant, it is illogical to assume that a number of these carriers would be unable or unwilling to provide Eastman with the type of service proposed by Motor Transit.

APPENDIX

Authority sought

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of the New York Central Railroad Company, of New York, N. Y., seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted: (1) against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-29130 (Sub-No. 92), by application filed June 23, 1961, as amended, The Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the site of the Eastman plant at Oakbrook, as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted against the handling of

traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 25th day of June A.D. 1965.

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

It appearing, That on August 10, 1962, the Commission, Operating Rights Review Board, made and filed its consolidated report (91 M.C.C. 161) and order in the above-entitled proceedings, denying the applications;

It further appearing, That upon consideration of the record, of petitions by applicants, and the reply of The American Trucking Associations, Inc., the Commission, division 1, by order dated February 13, 1963, reopened the proceedings for reconsideration on the present record;

It further appearing, That on June 17, 1963, the Commission, division 1, made and filed its consolidated report (92 M.C.C. 173) and order in the above-entitled proceedings, granting the applications;

It further appearing, That upon further consideration of the record, on June 23, 1964, the Commission, division 1, reopened the proceedings on its own motion for further consideration;

And it further appearing, That further consideration of the matters and things involved in these proceedings has been given and that the said division on the date hereof has made and filed its consolidated report on further consideration herein, containing its findings of fact and conclusions thereon, which report and the said reports of August 10, 1962, and June 17, 1963, are hereby referred to and made a part hereof;

It is ordered, That the said order of June 17, 1963, to the extent that it applies to No. MC-67916 (Sub-No. 20), be and it is hereby, vacated and set aside.

It is further ordered, That the said applications, except to the extent granted in the said report on further consideration, be, and they are hereby, denied.

By the Commission, division 1.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided June 17, 1963

* * * *

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, COMMISSIONERS HUTCHINSON, WEBB, AND HERRING

HERRING, *Commissioner:*

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of The New York Central Railroad Company, of New York, N. Y., hereinafter called Transport Company and the New York Central, respectively, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of general commodities between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at, or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

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[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

In No. MC-29130 (Sub-No. 92), by application filed June 23, 1961, as amended, The Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the site of the Eastman Kodak Company plant at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted against the handling of traffic originating at, or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

Both applications were opposed by American Trucking Associations, Inc., and Consolidated Freightways Corporation, of Delaware and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively. Consolidated stated in a telegram addressed to the Commission, dated April 23, 1962, that its opposition to the granting of the authority sought by Transport Company would be withdrawn upon amendment of the latter's application so as to restrict service against the handling of traffic which has not had a prior, or will not have a subsequent rail movement. Such an amendment was made.

The examiner recommended that the applications be denied, and in the prior report herein, 91 M.C.C. 161, decided August 10, 1962, the Operating Rights Review Board also denied the applications. Thereafter, upon consideration of the record, of petitions of applicants, and of a reply thereto by ATA, the proceedings were reopened for reconsideration on the present record by our order of February 13, 1963.

In its petition Transport Company contends (1) that it should not be required to show that "special circumstances" require the proposed service as Oakbrook is within the New York Central's Chicago terminal zone, and, therefore, is a rail point, (2) that whether Oakbrook is a rail point can only be determined by reference to the New York Central's terminal zone—not the Chicago commercial zone, as defined by the Commission, (3) that the fact that Oakbrook is in the New York Central's terminal zone constitutes "special circumstances," (4) that it can already provide the same service to Eastman under its parent railroad's TOFC plan II[2] service, and merely wishes to participate in providing service in its own name under TOFC plan III,[3] (5) that approximately 50 percent of Eastman's traffic between Rochester and its warehouse in Chicago moves in TOFC service, in flexivan equipment leased from Transport Company, (6) that it proposes to render the same service at the Oakbrook facility that it is now performing at the Chicago warehouse, (7) and that Transport Company has eliminated motor carrier opposition by agreeing to restrict its proposed operations to traffic having a prior or subsequent rail movement.

Motor Transit contends that the board erred (1) in concluding *(a)* that it was necessary for it to prove "special circumstances" in this case without reference to prior applications before the Commission, and *(b)* that the 27 carriers[4] granted authority should be afforded an oppor-

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[2] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

[3] Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

[4] These applications by the respective railroad affiliates, together with 28 other applications filed by independent motor carriers, also seeking authority to serve the Eastman plant at Oakbrook, were

tunity to provide service before additional service by this applicant is authorized, and (2) in stating that Motor Transit's application was restricted in the same manner as the application of Transport Company. It argues that it had already established proof of special circumstances in obtaining its present authority to conduct an unrestricted motor carrier operation between Chicago and Silvis, Ill., which lies beyond Eastman's plant at Oakbrook; that it is not necessary to prove special circumstances again; and that the evidence shows that Eastman requires its service as well as that of the 27 motor carriers that have been granted similar authority.

Petitioners request that the board's decision be reversed and that their respective applications be granted. In reply ATA controverts all of the principal contentions of both applicants and maintains that the board's findings and conclusions are correct and should not be disturbed.

The evidence, the petitions, the reply thereto, and the reports of the examiner and of the Review Board have been considered. We find the statements of facts in the examiner's and board's reports to be accurate in all material respects and, as supplemented, we adopt such statements as our own. The facts will be restated herein only to the extent necessary for clarity of discussion.

Transport Company generally operates over routes extending eastward from Chicago and holds certificates which authorize the transportation of general commodi-

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heard by the examiner on a consolidated record. The applications of the 28 independent carriers, which were unopposed, were the subject of a report and recommended order of the examiner, in No. MC-82 (Sub-No. 11), Best Way of Indiana, Inc., Extension—Oakbrook, Ill., wherein it was recommended that each of the respective applications be granted authority to serve the site of Eastman's plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago. All but one of these applications were subsequently granted, and certificates have been issued therein.

ties in a service auxiliary to that of its parent railroad. It has been an active participant in traffic moving from Eastman's manufacutring plants in Rochester to its warehouse facilities in Chicago. Eastman has utilized its service in the pickup and delivery of its products at Rochester and Chicago in connection with a plan III TOFC service. If the application is granted Motor Transport intends to perform a similar service for Eastman between Rochester and Chicago, except that pickup and delivery would be made at the Oakbrook facility instead of the Chicago warehouse. Actually, it is here seeking authority for a motor movement in the transportation of shipments between the rail ramp in Chicago and the plant in Oakbrook. It is contemplated that Eastman will continue, as in the past to lease flexi-van trailers from Motor Transport and to engage applicant to perform pickup and delivery service in connection with equipment and shipments moving in this manner over the rail lines of the New York Central.

Motor Transit operates generally over routes extending westward from Chicago, and is authorized to transport general commodities with certain exceptions over most of the routes in a service auxiliary to that of its rail affiliate. It also holds unrestricted motor carrier authority over certain routes, including one extending between Silvis, Ill., and Chicago. The highways authorized in this latter operation are located in close proximity to the Oakbrook facility; however, Motor Transit is not authorized to serve intermediate points on that route. Motor Transit has performed extensive service for Eastman in the transportation of less-than-truckload shipments from Chicago and desires to continue providing such a service from the new facility at Oakbrook.

At the time of the hearing Eastman had under construction a large plant at Oakbrook, to which it expected to move from its present location in Chicago in October 1962. Oakbrook is located about 18 miles west of Chicago,

and is about 2½ miles outside the Chicago commercial zone. Upon completion, the plant in Oakbrook will be the distribution center for Eastman's Midwest Sales Division which embraces 17 States. The Chicago warehouse is stocked with a wide variety of photographic materials and equipment from Eastman's manufacturing plants in Rochester. Many of the products are fragile and some of the more sensitive items must be kept under refrigeration. All of these items will be stocked at Oakbrook in the future. In 1960 about 29½ million pounds of the described commodities were moved from the Chicago facility. Nearly all of the independent motor carriers already granted authority to serve Oakbrook had long served the Chicago warehouse. Eastman anticipates a need for additional service at the new plant because of increased production. It requires prompt single-line service from its Oakbrook plant to various key points in the 17-State area. Eastman prefers to use the services of experienced motor carriers that have acquired skill in meeting its transportation needs.

Consolidated is the only motor carrier offering evidence in opposition to the instant applications. This protestant holds extensive authority as a common carrier of general commodities in Eastman's midwest sales territory and can provide direct service between Rochester and Oakbrook. However, it is not shown on the record whether Consolidated has ever transported any traffic for Eastman from Rochester to Chicago.

In general the Commission has endeavored to give effect to the requirements of section 5(2)(b) of the act concerning undue restraint of competition and to carry out the provisions of the national transportation policy with respect to the preservation of the inherent advantages of the different modes of transportation by requiring that any authority granted to a motor carrier affiliate of a railroad be restricted to service auxiliary to or supplemental of rail service. A discussion of this policy is set

forth in some detail in *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457, and will not be repeated. This policy has been relaxed only in those instances where special circumstances existed which require the unrestricted motor carrier service of a rail affiliated motor carrier. See *Union Pac. Motor Freight Co.—Key Point Restrictions*, 74 M.C.C. 279.

We do not agree with Motor Transport's contention that it is not required to show "special circumstances" because Oakbrook is within the Chicago terminal zone of the New York Central. The fact remains that Motor Transport desires to serve the Oakbrook facility in its capacity as a motor carrier. As Oakbrook is located beyond the Chicago commercial zone, specific authority is required to provide this service. See *Commercial Zones and Terminal Areas*, 54 M.C.C. 21. To adopt Motor Transport's view that Oakbrook is a rail point because it is in the New York Central's Chicago terminal zone would mean that the railroad could obviate the showing by its motor carrier affiliate of "special circumstances" with respect to additional points or of the need for the latter's service thereat by the simple expedient of publishing a tariff embracing such points.

Motor Transit argues that it is not required to show "special circumstances" to obtain the authority sought in the instant application because "special circumstances" have already been shown in prior proceedings in the involved area, particularly in connection with the unrestricted grant of authority to it over the route between Silvis and Chicago, which traverses an area located near Eastman's new facility at Oakbrook. We believe this position to be untenable. The application of any motor carrier, whether a rail affiliate or not, must rest upon its own factual situation. This view is in accord with the decision in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91, wherein the Commission said

"each case of this character must be determined upon the facts and circumstances disclosed by the evidence."

These proceedings involve certain facets of the "follow the traffic" theory. In the usual case, the shipper's factory or other origin plant is moved to a new location. Here, it is one of the shipper's distribution facilities that has been moved. The filing of the instant applications, as well as the related applications, was occasioned by the movement of the distribution center of Eastman's Midwestern Sales Division from Chicago to Oakbrook. In *Smith & Solomon Trucking Co. Extension—Camden, N. J.*, 61 M.C.C. 748, the Commission stated that "a grant of authority on a mere showing of loss of traffic without proof of lack of adequate existing service in the new location would be contrary to law and sound reasoning." Carriers have been allowed to follow the traffic where existing carriers would not be harmed, *Helm's Exp., Inc., Extension—Mahwah, N. J.*, 67 M.C.C. 183, or where there is a need for the service of a particular carrier, *P. Callahan, Inc., Extension—Souderton, Pa.*, 73 M.C.C. 696.

As indicated above, we are of the opinion that these rail affiliated applicants have failed to demonstrate that they should be freed from the burden of showing "special circumstances." Eastman actively supported these applicants as well as all but three of the independent motor carrier applicants because *(a)* all had served the shipper at its Chicago warehouse in a satisfactory manner, and *(b)* it requires a prompt service by carriers skilled in handling its products. The evidence shows that service in addition to that performed by the carriers supported by Eastman was utilized at the Chicago warehouse. Eastman contemplates a need for an expanded service at Oakbrook due to increased production. The public interest is of primary importance, in cases of this nature, and in our opinion the demonstrated specific need of the shipper, Eastman, constitutes "special circumstances" in these

proceedings. Moreover, the dearth of motor carrier opposition to the applications indicates that any harmful effect of approval thereof upon existing carriers would be minimal. All things considered, we conclude that the applications should be granted. Inasmuch as 27 motor carriers have been granted authority to serve the involved plant site and the evidence shows a need for service at that point only, it seems that the authority granted herein should be similarly restricted.

In No. MC-67916 (Sub-No. 20), on reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle over irregular routes, of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-29130 (Sub-No. 92), on reconsideration, we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, except those of unusual value, household goods as defined by the Commission, and those requiring special equipment, serving the plant site of the Eastman Kokak Company at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations between Chicago and Silvis, Ill., restricted against the handling of traffic originating at or destined to points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

We further find that each applicant is fit, willing, and able properly to perform the proposed service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; and that appropriate certificates should be granted.

Upon compliance by the respective applicants with the requirements of section 215, 217, and 221(c) of the act and the Commission's rules and regulations thereunder within the time specified in the order entered concurrently herein appropriate certificates will be issued.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 17th day of June A.D. 1963.

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

It appearing, That on August 10, 1962, the Commission, Operating Rights Review Board, made and filed its consolidated report and order in the above entitled proceedings, denying the applications;

It further appearing, That upon consideration of the record, of petitions by applicants, and the reply of The American Trucking Associations, Inc., by order dated February 13, 1963, the proceedings were reopened for

reconsideration on the present record and referred to division 1 for disposition;

And it further appearing, That reconsideration of the matters and things involved in these proceedings has been given and that the said division on the date hereof has made and filed its consolidated report on reconsideration herein, containing its findings of fact and conclusions thereon, which report and the said report of August 10, 1962, are hereby referred to and made a part hereof;

It is ordered, That the said order of August 10, 1962, be, and it is hereby, vacated and set aside;

It is further ordered, That the said applications except to the extent granted in the said report on reconsideration, be, and they are hereby, denied.

And it is further ordered, That unless compliance is made by applicants with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration shall be considered as null and void and the applications shall stand denied in their entirety effective upon the expiration of the said compliance time.

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX D

INTERSTATE COMMERCE COMMISSION

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided August 10, 1962

* * * *

REPORT OF THE COMMISSION

OPERATING RIGHTS REVIEW BOARD, MEMBERS GAFFNEY, CAVE, AND FREIDSON

BY OPERATING RIGHTS REVIEW BOARD:

Exceptions to the examiner's recommended order were separately filed by both applicants and intervener, Eastman Kodak Company, hereinafter called Kodak. The American Trucking Associations, Inc., hereinafter called American Trucking, protestant, replied.

In No. MC-67916 (Sub-No. 20), by application filed June 20, 1961, as amended, the New York Central Transport Company, a wholly owned subsidiary of the New York Central Railroad Company, of New York, N. Y., hereinafter called Transport Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle, of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill.; restricted (1) against the handling of traffic originating at, or destined to, points

[1] This report also embraces No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties, and (2) against the handling of traffic which has not had a prior, or will not have a subsequent, rail movement.

In No. MC-20130 (Sub-No. 92), by application filed June 23, 1961, as amended, the Rock Island Motor Transit Company, a wholly owned subsidiary of the Chicago, Rock Island and Pacific Railroad Company, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, except those of unusual value, household goods as defined by the Commission in *Practices of Motor Common Carriers of Household Goods*, 17 M.C.C. 467, and those requiring special equipment, between Chicago, Ill., and the site of the Eastman Kodak Company plant at Oakbrook, Ill., as an off-route point in connection with presently authorized regular-route operations to and from Chicago, restricted in the same manner as the titled proceeding. American Trucking opposes both applications. Consolidated Freightways Corporation and its affiliate, New York Consolidated Freightways Corporation, hereinafter called Consolidated, withdrew their opposition upon amendment of Transport Company's application in the manner hereinafter described.

The examiner recommended that the applications be denied. On exceptions, Transport Company and intervener collectively assert (1) that Oakbrook, which is located in the Chicago rail terminal zone of Transport Company's parent railroad, is a rail point and Transport Company is not required to show the existence of "special circumstances," (2) that, however, if Oakbrook is not considered to be a rail point for the reason given above, special consideration should be afforded Transport Company since it can already provide the same physical serv-

ice to Kodak under the parent railroad's TOFC plan II [2] service, and merely wishes to provide service in its own right under TOFC plan III,[2] (3) there has been neither a showing of any adverse effect upon competition nor any evidence that any independent motor carrier will provide service, and (4) that the lack of evidence of the availability and willingness of motor carriers to provide this service is sufficient proof of special circumstances. In its exceptions, Motor Transit asserts that it has already proven the existence of special circumstances with respect to the routes under consideration here in prior proceedings, and that there is no need for it again to carry the greater burden of proof just because the shipper has relocated its plant at a point just outside the Chicago commercial zone.

In reply American Trucking asserts (1) that the examiner's report is correct and should be affirmed, (2) that in view of the fact that 28 independent motor carriers were granted authority to serve this same plant, it is incredible that applicants and intervener can argue in good faith that there is no motor carrier service available, and (3) that the burden of proof remains upon applicants at all times to show that a grant of authority to them is not an invasion of the motor carrier field.

The evidence, the examiner's recommendations, the exceptions, and the reply thereto have been considered. The examiner's statement of facts, which we adopt as our own, is amply supported by the evidence, is accurate in all material respects, and is incorporated here by reference. For clarity of discussion, a portion of the examiner's statement of facts is set forth in the appendix hereto.

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[2] Plan II: Railroad performs its own door-to-door service, moving its own trailers or containers on flatcars under tariffs usually similar to those of truckers.

Plan III: Ramp-to-ramp rates based on a flat charge, regardless of the contents of trailers or containers, usually owned or leased by freight forwarders or shippers. No pickup or delivery is performed by the railroad.

By letter dated April 12, 1962, Transport Company requested that its application be amended so as to restrict the service to the handling of traffic having either a prior or subsequent rail movement. On April 19, 1962, American Trucking filed a motion to strike the letter request by applicant for the reason that *(a)* the letter did not comply with the Commission's General Rules of Practice which requires the formal filing of a motion for leave to amend an application supported by a certification of proper service, and *(b)* such amendment is irrelevant to the disposition of the proceeding. Applicant's reply thereto, filed May 9, 1962, embraced an alternative formal motion to amend the application. Inasmuch as the proposed amendment is restrictive in nature and the alternative motion to amend the application complies with the General Rules of Practice, the amendment will be allowed. A ruling on American Trucking's motion to strike the letter request, therefore, is moot. Consolidated, by letter dated April 18, 1962, requested that its opposition to the application be withdrawn if the requested amendment were granted.

CONCLUSIONS

In line with the decision in *Rock Island M. Transit Co. —Purchase—White Line M. Frt.*, 40 M.C.C. 457, the Commission has required that an affiliate of a railroad which proposes a service that is neither auxiliary to, nor supplemental of existing service, demonstrate the existence of "special circumstances" which warrants favorable action. Where, as here, a railroad affiliate seeks to obtain authority to off-rail points, it is necessary that the applicant meet this burden of proof. Compare No. MC-78786 (Sub-No. 236), *Pacific Motor Trucking Co. Extension—Automobiles*, 91 M.C.C.—(decided June 28, 1962), and cases cited therein.

One of the primary issues presented here is whether service to a point located within a railroad's terminal

zone for the purpose of so-called exempt operations under TOFC plan II, pickup and delivery, but outside the Commission's prescribed motor vehicle commercial zone, constitutes service to a rail point. We think not. The term "rail point" may be coextensive with a railroad's terminal zone for the purpose of rail service, but the proposed service here is a motor carrier service subject to part II of the Interstate Commerce Act. Compare, *New York Central Transport Co.—Modification*, 89 M.C.C. 389, wherein applicant's contentions are extensively discussed.

It is clear, therefore, that for a railroad-motor carrier affiliate to provide a motor carrier service in its own right it must have appropriate motor operating authority. Thus, although service may be provided to a point located in the parent railroad's terminal zone as an incident to TOFC plan II rail service, motor operating authority is needed to serve the same point in an all-motor service. Nor do we believe that the mere fact that applicants are able to perform the same physical operation under TOFC plan II as they propose here under TOFC plan III is a sufficient basis for extending their motor operating authorities without regard to proof of the existence of special circumstances. In addition, Motor Transit's assertion that it is not necessary to prove special circumstances in each proceeding is not in conformity with the Commission's decision in *Rock Island Motor Transit Co. Com. Car. Application*, 63 M.C.C. 91.

Furthermore, in No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.* (not printed), wherein the examiner's recommended order became effective by operation of law on October 9, 1961, 28 independent motor carriers were granted authority to serve Kodak's plant at Oakbrook.[3] The applications of these

[3] The applications involved here were heard on the same consolidated record.

carriers were unopposed and certificates have now been issued to 27 of the 28 applicants. These carriers should be afforded a reasonable opportunity to provide the needed service to the full extent of their authority before any additional service is authorized, and, even though they are not protestants herein, the Commission may take official notice of its outstanding grants of authority. See *R. B. "Dick" Wilson, Inc., Extension—Nebraska*, 66 M.C.C. 725. Here, there is a plethora of recently granted motor common carrier service available, and no need has been shown which would warrant granting any additional authority.

One further matter remains for consideration. Kodak has requested that, in the event the examiner's recommended denial is sustained, these proceedings be set for further hearing in order that Kodak may demonstrate the "special circumstances" involved. In view of the abundance of motor carrier service available, we are unable to perceive of what factual matter Kodak could produce at a further hearing at this time which would alter our conclusions. In the circumstances, the request must be denied.

We find that applicants have failed to establish that the present or future public convenience and necessity require the proposed operations, and that the applications should be denied.

An appropriate order will be entered.

APPENDIX

Pertinent portions of the examiner's recommended report

These applications, by the respective railroad affiliates, together with 28 other applications filed by independent motor common carriers, also seeking authority to serve the Eastman plant at Oakbrook, were heard by the ex-

aminer, on a consolidated record, at Chicago on July 31, 1961. The applications of the 28 independent carriers, which were unopposed as a result of restrictive amendments made at the time of the hearing, were the subject of a report and recommended order of the examiner served September 8, 1961, in No. MC-82 (Sub-No. 11), Best Way of Indiana, Inc., Extension—Oakbrook, Ill., wherein it was recommended that each of the respective applicants be granted authority to serve the Eastman plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago. Eastman, the sole supporting shipper, intervened in the proceedings. Unlike the applications of the independent motor carriers, the two rail-subsidiary applications here considered were opposed by American Trucking Associations, Inc., Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively.

The Transport Company holds certificates of public convenience and necessity issued by this Commission authorizing motor common carrier operations in the transportation of general freight over a network of regular routes extending eastward from Chicago and generally paralleling the lines of its parent railroad. Operations over these routes are subject to the usual conditions designed to restrict the service to be rendered to one auxiliary to or supplemental of the rail service of the New York Central, and applicant is not authorized to serve any point not a station on the lines of that railroad.

Motor Transit holds certificates issued by this Commission authorizing motor common carrier operations over a network of routes extending westward from Chicago and generally paralleling the lines of its parent railroad. In some respects, operations over these routes are subject to the usual "auxiliary to or supplemental of rail" re-

strictions, but in other respects they are not so encumbered. One of its unrestricted routes, extending between Chicago and Silvis, Ill., approaches the Oakbrook site, but it is not authorized to serve intermediate points on such route.

There is no serious dispute as to the facts. Briefly Eastman manufactures a wide variety of photographic materials and equipment at its home office and plant in Rochester, N. Y., which are distributed to dealers and industrial users throughout the country. We are here concerned with the distribution out of its Midwestern Sales Division at Chicago. The Midwestern Sales Division embraces some 17 States in the midwestern section of the country, extending as far west as Montana, as far south as Arkansas, and as far east as Ohio. All distribution within the 17-State area moves out of the Midwestern Sales Division facility at Chicago. The total outbound tonnage in 1960 amounted to some 29½ million pounds, of which 96 percent moved by motor vehicle. The Chicago facility is stocked from the several manufacturing plants of the company at Rochester, and the tonnage moved from Rochester to Chicago in 1960 amounted to over 36 million pounds, 60 percent of which moved by motor vehicle.

This proceeding arises as a result of a determination by Eastman to move its Chicago facilities to larger and more modern quarters at Oakbrook. The Oakbrook site is in Du Page County, Ill., approximately 18 miles due west of Downtown Chicago. It is west of Illinois Highway 83, north of U.S. Highway 34, and south of the East-West Tollway running between Chicago and Aurora, Ill. It is some 2½ miles beyond the western limits of the Chicago commercial zone as defined by the Commission. The plant site area is not served by rail, and Eastman considers that rail facilities are unnecessary and unanticipated. It does desire, however, to have available at the

new site as much, and possibly more, motor service than that now enjoyed at the Chicago site and hence supports most of the applications involved in the instant proceeding, in order that it may be assured of fast, dependable, single-line motor service for the delivery of its products with the dispatch required. Some of Eastman's products, including film and sensitized paper, require refrigeration in transit.

The largest volume of outbound traffic moves to key cities in the sales territory in so-called pool truck shipments. These key cities are Minneapolis and St. Paul, Minn., Milwaukee, Wis., Kansas City, Mo., Cincinnati, Ohio, Louisville, Ky., Des Moines and Sioux City, Iowa, St. Louis, Mo., Indianapolis, Ind., and Omaha, Nebr. There is a substantial volume of less-than-truckload traffic, however, and smaller shipments are dispatched from time to time to almost every community of any size in the territory. Eastman appears to have utilized the service of Motor Transit to some extent with respect to less-than-truckload shipments out of Chicago. It does not utilize the service of the Transport Company except to the extent that the latter has performed certain local pickup and delivery services for Eastman in connection with a plan III trailer-on-flatcar (TOFC) service of the New York Central from Rochester to Chicago. Under the present arrangement, the Transport Company leases the trailers to Eastman and Eastman engages the Transport Company to move such trailers from the Rochester plant to the railroad's Rochester terminal and from the railroad's Chicago terminal to Eastman's Chicago facility. A similar arrangement would purportedly be affected if the instant application of the Transport Company were granted, except that the latter would make ultimate delivery at Oakbrook, rather than to Eastman's Chicago plant.

Evidence in opposition to the applications was submitted on behalf of Consolidated. It conducts substantial operations as a motor common carrier of general freight over a network of routes extending the length and breadth of Eastman's midwestern sales territory. It serves Oakbrook, and a great many points on the lines of both the Transport Company and Motor Transit. Among other points, it serves Rochester and is in a position to provide direct single-line service between Rochester and Oakbrook. There is no indication as to the extent, if any, to which it has handled traffic for Eastman in the past.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

Served March 16, 1962

* * * *

No. MC-67916 (Sub-No. 20)[1]

NEW YORK CENTRAL TRANSPORT COMPANY EXTENSION—OAKBROOK, ILL.

Decided ————

* * * *

REPORT AND ORDER

RECOMMENDED BY WILLIAM E. MESSER, HEARING EXAMINER

By application filed June 20, 1961, as amended, in No. MC-67916 (Sub-No. 20), New York Central Transport Company, a corporation, of New York, N. Y., hereinafter called the Transport Company, seeks a certificate of public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, between Chicago, Ill., and the plant site of the Eastman Kodak Company at Oakbrook, Ill., over irregular routes.[2] Applicant is a subsidiary of the New York Central Railroad.

By application filed June 23, 1951 [sic], as amended, in No. MC-29130 (Sub-No. 92), The Rock Island Motor Transit Company, a corporation, of Des Moines, Iowa, hereinafter called Motor Transit, seeks a certificate of

[1] This report also embraces No. MC-29130 (Sub. No. 92), The Rock Island Motor Transit Company Extension—Oakbrook, Ill.

public convenience and necessity authorizing operation, in interstate or foreign commerce, as a common carrier by motor vehicle of general commodities, with certain exceptions, serving the site of the Eastman plant described above, as an off-route point in connection with presently authorized regular-route operations to and from Chicago.[2] Applicant is a subsidiary of the Chicago, Rock Island and Pacific R. R. Co.

These applications, by the respective railroad affiliates, together with 28 other applications filed by independent motor common carriers, also seeking authority to serve the Eastman Plant at Oakbrook, were heard by the examiner, on a consolidated record, at Chicago on July 31, 1961. The applications of the 28 independent carriers, which were unopposed as a result of restrictive amendments made at the time of the hearing, were the subject of a report and recommended order of the examiner served September 8, 1961, in No. MC-82 (Sub-No. 11), *Best Way of Indiana, Inc., Extension—Oakbrook, Ill.*, wherein it was recommended that each of the respective applicants be granted authority to serve the Eastman plant at Oakbrook in connection with presently authorized regular-route operations to and from Chicago.[3] Eastman, the sole supporting shipper, intervened in the proceedings. Unlike the applications of the independent motor carriers, the two rail-subsidiary applications here considered were opposed by American Trucking Associations, Inc., Consolidated Freightways Corporation of Delaware, and an affiliate of the latter, New York Consolidated Freightways Corporation, hereinafter called ATA and Consolidated, respectively.

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[2] Restricted against the handling of traffic originating at or destined to, points in Lake and Porter Counties, Ind., and points in Illinois other than those in St. Clair and Madison Counties.

[3] Most of the orders in these cases have become effective and appropriate certificates have been issued.

The Transport Company holds certificates of public convenience and necessity issued by this Commission authorizing motor common carrier operations in the transportation of general freight over a network of regular routes extending eastward from Chicago and generally paralleling the lines of its parent railroad. Operations over these routes are subject to the usual conditions designed to restrict the service to be rendered to one auxiliary to or supplemental of the rail service of the New York Central and applicant is not authorized to serve any point not a station on the lines of that railroad.

Motor Transit holds certificates issued by this Commission authorizing motor common carrier operations over a network of routes extending westward from Chicago and generally paralleling the lines of its parent railroad. In some respects, operations over these routes are subject to the usual "auxiliary to or supplemental of rail" restrictions, but in other respects they are not so encumbered. One of its unrestricted routes, extending between Chicago and Silvis, Ill., approaches the Oakbrook site, but it is not authorized to serve intermediate points on such route.

There is no serious dispute as to the facts. Briefly, Eastman manufactures a wide variety of photographic materials and equipment at its home office and plant in Rochester, N. Y., which are distributed to dealers and industrial users throughout the country. We are here concerned with the distribution out of its Midwestern Sales Division at Chicago. The Midwestern Sales Division embraces some 17 States in the midwestern section of the country, extending as far west as Montana, as far south as Arkansas, and as far east as Ohio. All distribution within the 17-State area moves out of the Midwestern Sales Division facility at Chicago. The total outbound tonnage in 1960 amounted to some 29½ million pounds, of which 96 percent moved by motor vehicle. The

Chicago facility is stocked from the several manufacturing plants of the company at Rochester, and the tonnage moved from Rochester to Chicago in 1960 amounted to over 36 million pounds, 60 percent of which moved by motor vehicle.

This proceeding arises as a result of a determination by Eastman to move its Chicago facilities to larger and more modern quarters at Oakbrook. The Oakbrook site is in Du Page County, Ill., approximately 18 miles due west of Downtown Chicago. It is west of Illinois Highway 83, north of U. S. Highway 34, and south of the East-West Tollway running between Chicago and Aurora, Ill. It is some 2½ miles beyond the western limits of the Chicago Commercial Zone as defined by the Commission. The plant site area is not served by rail, and Eastman considers that rail facilities are unnecessary and unanticipated. It does desire, however, to have available at the new site as much, and possibly more, motor service than that now enjoyed at the Chicago site and hence supports most of the applications involved in the instant proceeding, in order that it may be assured of fast, dependable, single-line motor service for the delivery of its products with the dispatch required. Some of Eastman's products, including film and sensitized paper, require refrigeration in transit.

The largest volume of outbound traffic moves to key cities in the sales territory in so-called "pool truck" shipments. These key cities are Minneapolis and St. Paul, Minn., Milwaukee, Wis., Kansas City, Mo., Cincinnati, Ohio, Louisville, Ky., Des Moines and Sioux City, Iowa, St. Louis, Mo., Indianapolis, Ind., and Omaha. Nebr. There is a substantial volume of less-truckload traffic, however, and smaller shipments are dispatched from time to time to almost every community of any size in the territory. Eastman appears to have utilized the service of Motor Transit to some extent in respect of less-

truckload shipments out of Chicago. It does not utilize the service of the Transport Company except to the extent that the latter has performed certain local pickup and delivery services for Eastman in connection with a Plan III trailer-on-flatcar (TOFC) service of the New York Central from Rochester to Chicago.[4] Under the present arrangement, the Transport Company leases the trailers to Eastman and Eastman engages the Transport Company to move such trailers from the Rochester plant to the railroad's Rochester terminal and from the railroad's Chicago terminal to Eastman's Chicago facility. A similar arrangement would purportedly be effected if the instant application of the Transport Company were granted, except that the latter would make ultimate delivery at Oakbrook, rather than to Eastman's Chicago plant.

Evidence in opposition to the applications was submitted on behalf of Consolidated. It conducts substantial operations as a motor common carrier of general freight over a network of routes extending the length and breadth of Eastman's midwestern sales territory. It serves Oakbrook, and a great many points on the lines of both the Transport Company and Motor Transit. Among other points, it serves Rochester and is in a position to provide direct single-line service between Rochester and Oakbrook. There is no indication as to the extent, if any, to which it has handled traffic for Eastman in the past.

The real and primary issue here presented is whether a motor carrier subsidiary of a railroad should be authorized to serve a non-rail point. In the opinion of this examiner, it should not, at least not in the absence of special and unusual circumstances. There is no question here concerning substituted motor-for-rail service because

[4] Plan III TOFC service is a railroad terminal-to-terminal service with the shipper providing the trailers and arranging for pickup at origin and delivery at destination.

rail service is not available. The situation here falls squarely within the principles announced in *Frisco Transp. Co., Extension—Springfield Airport*, 49 M.C.C. 63, wherein the Commission, Division 5, stated:

> The "unusual circumstances" which would justify a grant to a railroad or railroad affiliate of unrestricted authority to serve a particular point or route are not discussed in the quoted report (*Kansas City S. Transport Co., Inc., Com. Car. Application*, 10 M.C.C. 221, 28 M.C.C. 5), but we think it clear that in no event would a grant of authority to a railroad or railroad affiliate to serve a non-rail point be justified unless it appeared that otherwise the point or route in question would definitely lack reasonably adequate service by motor carrier, which service no independent motor carrier is able or willing to furnish. The airport here proposed by the applicant is adjacent to Springfield, a city of more than 60,000 population, in and through which many motor carriers operate.

These principles have consistently been adhered to by the Commission and supported by a number of Court decisions. No special or unusual circumstances are here shown to exist which would justify a departure from the general rule and the examiner concludes that the instant applications must be denied.

Motor Transit, on brief, argues that the necessary special and unusual circumstances have long since been established in respect of its unrestricted operations in the area, and need not be reestablished here. This argument is entirely without merit. True, we have granted Motor Transit some unrestricted authority, based upon a finding of special circumstances. However, in *Rock Island Motor Transit Co., Com. Car. Application*, 63 M.C.C. 91 (108), the Commission definitely indicated that each application seeking authority for unrestricted rights must be decided on its own merits and that each

case of such character must be determined upon the facts disclosed in that particular matter.

The transport Company, in its brief, indicates a willingness to accept a restriction limiting its service to one which is auxiliary to or supplemental of rail service. Such a restriction is inappropriate in connection with a grant of authority to serve a non-rail point. Nor, as urged, is the mere fact that the Transport Company owns the trailers to be utilized in the proposed service of any significance in determining the issues involved.

Upon consideration of the evidence of record, the examiner finds, in Nos. MC-67916 (Sub-No. 20) and No. MC-29130 (Sub-No. 92) that the respective applicants have failed to establish that the operations proposed are or will be required by the present or future public convenience and necessity, and that the considered applications should be denied. In view of the findings herein, it is recommended that the appended order be entered.

By William E. Messer, Hearing Examiner.

/s/ WILLIAM E. MESSER

Recommended by William E. Messer,
Hearing Examiner.

/s/ WILLIAM E. MESSER

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the ..... day of ....., A.D. 1962

No. MC-67916 (Sub-No. 20)

NEW YORK CENTRAL TRANSPORT COMPANY
EXTENSION—OAKBROOK, ILL.

No. MC-29130 (Sub-No. 92)

THE ROCK ISLAND MOTOR TRANSIT COMPANY
EXTENSION—OAKBROOK, ILL.

Investigation of the matters and things involved in these proceedings having been made, said applications upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon; which report is hereby made a part hereof, and said proceedings, having been duly sumitted:

It is ordered, That said applications be, and they are hereby, denied.

And it is further ordered, That this order shall be effective on .....

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX F

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

REGULATION IN GENERAL; CAR SERVICE; ALTERATION OF LINE

SEC. 1. [*As amended June 29, 1906, April 13, 1908, June 18, 1910, May 29, 1917, August 10, 1917, February 28, 1920, June 19, 1934, August 9, 1935, September 18, 1940, June 24, 1948, August 2, 1949, August 12, 1958.*] [*49 U.S.C. § 1.*]

* * * *

(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

COMBINATIONS AND CONSOLIDATIONS OF CARRIERS

SEC. 5. [*As amended August 24, 1912, February 28, 1920, June 10, 1921, June 16, 1933, June 19, 1934, August 9, 1935, September 18, 1940, and August 2, 1949.*] [*49 U.S.C.* §5.]

* * * * *

(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part

thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reason-

able, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

APPLICATION OF PROVISIONS

SEC. 202. [*August 9, 1935, amended September 18, 1940, May 16, 1942.*] [*49 U.S.C. § 302.*] (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

* * * * *

(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

* * * * *

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an

express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

SEC. 206. [*August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.*] [*49 U.S.C. § 306.*] (a) (1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on an public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served

by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207 (a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

ISSUANCE OF CERTIFICATE

SEC. 207. [*August 9, 1935.*] [*49 U.S.C. § 307.*] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the

certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.